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JUDGE ESTEE SAYS PRIMO LICENSE LAW IS INVALID

The Mainland Beer Has the Same Rights in the Territory as the Honolulu Brew.

Twenty-Five Saloons May Close as a Result. Temperance People Happy---No More Cheap Licenses Will Be Issued.

THE PRIMO beer license law was declared unconstitutional and void by Judge Estee yesterday, and the injunction as prayed for by the local agents of the mainland breweries, restraining Treasurer Wright from the further issuance of $250 licenses was granted.

The decision in effect means that no more license for the exclusive sale of Honolulu made beer can be issued, but whether or not it will nullify the licenses of the saloons now selling Primo beer is still an open question. The decision has been appealed from, and pending its final determination the saloons now doing business under Primo licenses may continue to operate, unless further action is taken by the plaintiffs; though the order in the case would operate to prevent a renewal of such licenses and at the outside the sale of Primo beer would terminate within six months, though according to one view every saloon keeper holding a $250 license could be prosecuted for alleged liquor selling, the license having been declared void.

The plaintiffs in this case, which was brought to test the law are: Macfarlane & Co., Ltd., agents for the Val Blatz Brewing Company of Milwaukee, and the John Wieland Brewing Company of San Francisco; H. Hackfeld & Co., Ltd., agents for the Anheuser-Busch Brewing Company of St. Louis; W. C. Peacock & Co., Ltd., agent for the Pabst Brewing Company of Milwaukee, American Brewing Company of St. Louis, and Buffalo Brewing Company of Sacramento; Ed. Hoffschlaeger & Co., Ltd., agents for the Fred Miller Brewing Company of Milwaukee; St. C. Sayers, agent for the Seattle Brewing & Malt Co.; Lawrence H. Dee, agent for the Capital Brewing Company of Olympia.

All the plaintiffs but Dee hold dealers' or wholesalers' licenses at $500, while the latter paid $1000 per year.

After reciting the facts of the complaint, and the statutes and legislative acts under which the licenses were issued, Judge Estee, in reference to the $250 licenses, said:

"But as a condition precedent to the issuance of said license, each applicant was required to execute a bond in the penal sum of $1000 conditioned among other things as follows:

"Second: That he will not sell or otherwise dispose of on the premises for which he is licensed, any wines, malt liquors or spirits of any description whatsoever except such beer manufactured in Honolulu and under said above mentioned act (the act to license the brewing of malt liquors in Honolulu). Plaintiff Exhibit 2.

"In other words, said licensees are given the privilege of selling at retail Honolulu manufactured beer under licenses which are to be paid for at the rate of $250 per annum, upon condition that they do not either store or sell upon the premises any foreign manufactured beer or other spirits.

"From the testimony of the defendant, W. H. Wright, it appears that 25 of these licenses were issued between July 1, 1901, and November 25, 1901, and the testimony further shows that certain of the licensees are doing business thereunder."

The demand made upon the Treasurer by the plaintiffs for $250 licenses and his refusal to issue them is set out, and the court says:

"No licenses as demanded were ever issued to the complainants or any one of them, as in the language of the defendant in his answer on file herein, 'in the exercise of the discretion vested in him, he refused to issue the licenses hereinabove requested and still refuses to issue the same.'

"While the real issue in this case is whether chapter 46 of the Session Laws of 1888 (now part V, chapter 41 of 'The Penal Laws of the Hawaiian Islands, 1897,') is unconstitutional and void by reason of its discrimination against the beer products of the other States and Territories of the United States, yet the jurisdiction of the court on other grounds has been assailed upon the hearing, although no plea thereto was raised by defendant's answer.

"In the matter of jurisdiction two questions are to be considered by the court:

"First: Is there a constitutional question involved in the case? and Second: Do the facts in the case show an amount of injury sufficient to enable the court to assume and retain jurisdiction in accordance with the provisions of the law giving jurisdiction to Circuit Courts in certain cases?

"Section 1 of the act of 1888 Vol. 25, Statutes of the United States, p. 434) amendatory of the act of 1875, provides as follows:

"'The Circuit Courts of the United States shall have original cognizance * * * of all suits of a civil nature at common law or in equity where the matter in dispute exceeds exclusive of interest and costs the sum or value of $2000 and rising under the constitution or laws of the United States.'

"There is no doubt as to the bill of complainants showing upon its face a sufficient case for the court to take jurisdiction originally, alleging as it does both the statutory amount of injury and the fact that the Territorial statute complained of is in violation of the Constitution of the United States; and no plea having been filed on the part of the defendant to the jurisdiction. As was said by the Supreme Court of the United States in the case of Hartog vs. Memory, 116 United States 588, parties cannot call upon the court to go behind the record, 'except by a plea to the jurisdiction or some other appropriate form of proceeding. The case is not to be tried by the parties as if there was a plea to the jurisdiction when no such plea has been filed.'

"This is not an action at law. It is an application for an injunction and therefore within the equity jurisdiction of the court. The injury complained of if any be shown, is a continuing one, and it has been frequently held that in a suit in equity where an injunction is asked for, the amount in dispute is not the amount in controversy, but rather the value of the object to be gained by the bill."

After quoting several former decisions as to the question of injury, the court says:

"And while it is true that the complainants did not all establish a clear pecuniary loss, yet it is apparent that each of them was injured in his individual right to free commerce in the infringement thereof, by this discriminating statute, and in addition to this common injury sustained by all, there was, in the estimation of the court, sufficient specific pecuniary loss shown by at least two of the complainants, to-wit: Peacock & Co. and L. H. Dee, in damage to each of them by reason of the falling off of sales since the issuance of the licenses to sell the Honolulu brewed beer to meet the requirements of the statutes in relation to the amount of damage involved in a suit to give this court jurisdiction, and especially as it appears that this injury will be a continuing one, the amount of which cannot now be clearly estimated in dollars and cents.

"It would seem apparent therefore that the jurisdiction is shown by at least two of the complainants."

Referring to the question of constitutional rights, Judge Estee says:

"Under the state of facts disclosed in this case, are the complainants, while selling the beers of the different persons and corporations, citizens of other States, for whom they respectively act as agents in Honolulu on an equal footing in a free market with the manufacturers of home-brewed beer?"

The privileges conferred by the various forms of licenses are contrasted and the court concludes:

"It seems to be clear that upon the face of sections 479 to 481 inclusive, they are grossly discriminating against a foreign manufactured commodity, in this instance foreign manufactured beer. And this is made absolutely plain from the testimony of Mr. Wright, the defendant herein, who, referring to a conversation with Mr. Robertson, one of the attorneys for the complainants, in relation to the issuance of a license to them, said:

"'You informed me what you wanted and I told you that I would not issue a license under the law (act of 1888) to sell foreign beer, and you then told me that perhaps there would be a suit brought against me. * * * I refused to issue a license under that law for the sale of beer manufactured outside of Honolulu.' The court: Let us get at it. For a manufacturer of the mainland beer to sell beer in this Territory, he must pay to the Territory a thousand dollars a year, is that so? A. They must obtain a retail liquor license. Q. For a thousand dollars a year? A. Yes, sir; which permits them to sell everything. Q. But they cannot sell that imported beer unless they have one of those thousand dollar licenses? A. That is correct. Q. And they can sell home-made beer for $250 a license, is that correct? A. Yes, sir.

"In other words, any man to whom a license is issued to sell and who will give bond to sell none but Honolulu brewed beer, can do so for a license fee of $250 a year; but any man who desires to sell imported beers at retail must take out a retailer's license and pay $1000 a year, or exactly four times the amount he would have to pay to sell home-brewed beer alone, and while paying this $1000 a year, is not even then permitted to sell the Honolulu commodity thereunder.

"Clear discrimination is shown as against the manufacturers of the foreign commodity, for which they have a right through their agents to complain, and the fact that the $1000 license also covers the sale of spirituous liquors other than beer is a mere incident; the fact remains that the imported beers cannot be sold except upon a license costing four times the amount of the license to sell the home brewed beer. Such a discrimination is repugnant to the constitution of the United States, and clearly in violation of its provision hereinbefore set forth.

"It is true that under the police powers of a State or Territory, it can regulate the sale of all intoxicating liquors within its bounds, or prohibit such sale entirely, but in doing so it cannot discriminate against the stranger within its gates. The local laws of this Territory, far from prohibiting the sale of spirituous liquors herein, directly contemplate the continuance of the liquor traffic, and derive a revenue therefrom by licensing it. Nothing is better settled, however, than that a State cannot constitutionally enact laws discriminating in favor of its own citizens or in favor or against the citizens of any other State of the United States. On this rests one of the most sacred rights of citizenship. If the laws of one State or Territory can discriminate against the property rights of the citizens of another State or Territory in one thing, they can do so in all things. It would hardly seem necessary to refer to authorities sustaining this proposition. But it was held by the Supreme Court of the United States in the case of Walling vs. Michigan, 116 United States 446, which is a case in relation to the constitutionality of a statute imposing a tax on persons engaged in the sale of liquors to be brought into and sold within the State:

"A discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first mentioned State is in effect, a regulation in restraint of commerce among the States and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States.'

"I am therefore of the opinion that chapter 46 of the Session Laws of 1888 now known as Part V of chapter 41 of the 'Penal Laws of the Hawaiian Islands, 1897,' entitled 'Sale of Malt Liquors,' is unconstitutional and void. Let the injunction issue as prayed for.

"ESTEE, Judge."

NO MORE CHEAP LICENSES.

There is considerable difference of opinion as to just what effect the decision of Judge Estee will have on the local saloon situation. One thing is certain, no more licenses to sell Primo

(Continued on Page 11.)

CORPORATION CANNOT BID

Dole's Opinion on Thousand-Acre Clause.

THE TERRITORY'S RIGHTS DEFINED

Has No More Power Than Private Parties in Selling Land to Plantations.

UNDER an opinion given by Attorney-General Dole to the Executive Council at the request of the governor, corporations owning one thousand acres of land in the Territory will not be allowed to bid in more. However, the plantations may still acquire leases and the opinion will not change existing conditions, though under it, when present leases expire, the sugar corporations would not be allowed to purchase land in fee simple in excess of one thousand acres.

The opinion settles many interesting points of importance to the plantations and is given herewith in full:

MR. DOLE'S OPINION.

Territory of Hawaii,
Office of the Attorney General,
Honolulu, H. T., Feb. 13, 1902.

To His Excellency Sanford B. Dole, Governor of the Territory of Hawaii:

Sir:—I have the honor to acknowledge receipt of your request for my opinion as to how far the thousand acre clause in Section 55 of the Organic Act limits the power of the Territory to sell and convey real estate.

The provision in question is as follows: "No corporation, domestic or foreign, shall acquire and hold real estate in Hawaii in excess of one thousand acres; and all real estate acquired or held by such corporation or association contrary hereto shall be forfeited and escheat to the United States; but existing vested rights in real estate shall not be impaired."

Under date of April 10th, 1901, I submitted an opinion that the above provision does not apply to leaseholds, unless, possibly, leaseholds for such long periods as may be substantially equivalent to ownership. This opinion was approved by the Attorney General of the United States. The questions now raised, therefore, relate only to conveyances in fee, or, at least, substantial ownership.

The obvious intention of Congress was to limit future acquisitions of land in Hawaii by corporations. It said, "existing vested rights in real estate shall not be impaired." I think the words "in real estate," cannot be eliminated by construction so as to make the provision read "existing vested rights shall not be impaired." I think the words "in real estate" cannot be enlarged by construction and addition so as to make the provision read, "existing vested rights in real estate, and to sell or purchase real estate, shall not be impaired." Where the words and intent of Congress are plain and unmistakable, they cannot be contracted, stretched or distorted to make them mean what they do not mean. They must be accepted and obeyed as far as they apply, unless they violate some provision of the Constitution of the United States.

"The laws of Hawaii relating to public lands * * * shall continue in force until Congress shall otherwise provide. * * * All funds arising from the sale or lease or other disposal of such lands shall be appropriated by the laws of the government of the Territory of Hawaii, and applied to such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the Joint Resolution of Annexation approved July 7th, 1898." Section 73, Organic Act. Instructions from Washington also authorize the Territorial government to sell public lands the same as they were sold under the Republic, subject, of course, to all provisions of law relating thereto.

But the Territory can have no greater right than a private individual to sell lands to the purchaser who will pay most for them. It may even not have the same right as a private individual, for the title to public lands in this Territory is in the United States, and the power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the Territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the Territory or other property belonging to the United States." Mormon Church vs. United States, 136 U. S., 1. I think it is clear that the Territory cannot lawfully sell land to any purchaser lawfully prohibited from buying it.

Section 10 of Article I of the Constitution of the United States declares that: "No state shall * * * pass any * * * law impairing the obligation of contracts." If the limitation in question had been embodied in a state constitution or passed by a state legislature, a long line of judicial decisions, headed by the great case of Dartmouth College vs. Woodward, might be arrayed against its constitutionality on behalf of corporations created prior to October 24th, 1890. But Section 10 of Article I applies to state constitutions and state legislatures only; it does not extend to Congress legislating for Territories.

The Fourteenth Amendment to the Constitution of the United States declares: "Nor shall any state * * * deny to any person within its jurisdiction the equal protection of the laws." This also is a limitation of state power, not the power of Congress.

Most of the States have constitutional prohibitions against the passage of retrospective laws, but the Constitution of the United States contains no such provision. Within its sphere of legislation Congress has power to pass retrospective laws. The decision of the Supreme Court of the United States in the case of Carpenter et al. vs. The Commonwealth of Pennsylvania, 17 Howard, 456, illustrates the length to which that court has gone in sustaining retrospective legislation.

I see no ground for doubting the application or constitutionality of the thousand acre clause, except in the Fifth Amendment to the Constitution of the United States, which declares that: "No person shall * * * be deprived of * * * property without due process of law." This amendment applies to Territories.

All corporations created since the taking effect of the Organic Act, as far as their own rights are concerned, seem to be constitutionally subject to the thousand acre limitation. Act 43 of the Laws of 1890, entitled "An Act to Amend Chapter XXXI of the Civil Code in Regard to Corporations," as amended by the Laws of 1896, provides that: "Joint stock companies for the purpose of carrying on any business or undertaking, either mercantile, agricultural or manufacturing, or buying, selling, leasing or otherwise dealing in real estate and buildings and other structures, whether used or intended to be used as shops, stores, warehouses, offices, boarding and lodging houses, hotels, or otherwise, for which individuals may lawfully associate themselves (excepting banking and professional business), shall be * * * subject to all of the liabilities now provided by law for incorporated companies; and shall be subject to all general laws hereafter to be enacted in regard to corporations." Substantially all Hawaiian corporations incorporated for business purposes since October 24th, 1890, have been subject to reservations on the part of the government, which apparently include the power to limit future acquisitions of land.

The question of the constitutionality of the thousand acre clause, if such question there be, would seem to depend upon the rights of Hawaiian corporations cre-

(Continued on Page 12.)

BY AUTHORITY.

SHERIFF'S SALE NOTICE.

IN PURSUANCE OF AN EXECUTION issued by Lyle A. Dickey, Second District Magistrate of Honolulu, Island of Oahu, Territory of Hawaii, on the 15th day of January, A. D. 1902, in re matter of P. J. Travens vs. David K. Kupihea, I have, on this 29th day of January, A. D. 1902, levied upon, and shall expose for sale, at public auction, to the highest bidder, at the Police Station, Kalakaua Hale, in Honolulu aforesaid, at 12 o'clock noon of Monday, the 3d day of March, A. D. 1902, all the right, title and interest of the said David K. Kupihea in and to the following described property, unless the judgment, amounting to one hundred and twenty-one and 90-100 dollars, interest, costs and my expenses are previously paid.

Royal Patent 311, Land Commission Award 724, described by metes and bounds as follows:

Hoomakaia ke ana ana ma ke kihi Hema, a holo aku la ka aoao mua Ak. 86° 30′ Kom. 2 Kaul. 44 11-12 Kap. e pili ana ia aoao i ka aina o Haawinaaupo, huli Ak. 13° Kom. 30 4-12 Kapuai huli Ak. 21° Hi, 1 Kaul. 51 6-12 Kap. huli Ak. 12° 15′ Kom. 1 Kaul. 13 2-12 Kap. huli Ak. 33° Hi. 1 Kaul. 28 5-12 Kap. huli Ak. 73° Hi. 48 10-12 Kap. huli H. 72° Hi. 1 Kaul. 41 Kap., huli He. 11° Kom. 63 4-12 Kap. no Kamaikahulipu ka aina e pili ana ma keia mau aoao a pau, huli He, 23° 30′ Kom. 1 Kaul. 37 9-12 Kap., huli hou i ke kihi i hoomakai He 5° Hi 2 Kaul, e pili ana ia Kamakela.

Maloko o keia apana Hookahi Eka, 50 Anana.

Excepting and reserving that portion of R. P. 311, L. C. A. 724, conveyed by Kepola to J. H. Nui by deed dated the 16th day of October, 1890, and recorded in book 127, on page 125, and described as follows:

E Hoomaka ana ma ke kihi Kom. o keia apana ma ke kihi He. o ka loi no Hoaa He 61° Hi. 31.8 Kapuai me ke kula no Hoaa He 23° 30′ Ko. 66 kapuai me Kamakela. He 5° Hi 12 Kapuai me Kamakela a malaila aku i ka hoomaka ana. Maloko olaila 2976 kap.

And also that certain piece or parcel of land included in R. P. 311, L. C. A. 724, the same being that portion conveyed by Hoaa and Kaiwilei to J. H. Nui by deed dated the 3d day of April, 1889, and recorded in book 111, on page 361, and described as follows:

E hoomaka I ka ana ma ke kihi Akau mauka o e pili ana i ke auwai a me ka pa o ka haole no ke aupuni, aku a holo Hem. 72° Hi 1 Kaul. 41 kapuai, He 11° Kom. 63 4-12 kapuai Hem. 23° 30′ Kom. 37 9-12 kapuai ma ko Kamaikahulipu ame Kamakela a i ke kihi hikina loa o ko Debora mahele alaila, Ak 61° Kom. 31 8-12 kapuai Hem. 30° 30′ Kom 1 Kaul 22 5-12 kapuai Ak 71° Kom 1 kaul, 18 10-12 kapuai, ma ka hapa ia Debora Ak. 12° 15′ Kom. 60 5-12 kapuai Ak 33° Hi 1 kaul. 28 5-12 kapuai. Ak 73° Hik. 48 10-12 kapuai hiki i ke kihi i hoomaka, he 558 Anana.

The remaining portion of R. P. 311, L. C. A. 724, contains an area of 702 square fath., and is the same conveyed to said David K. Kupihea by deed dated July 20, 1899, and recorded in the office of the Registrar of Conveyances, in book 189, on page 160.

CHAS. F. CHILLINGWORTH,
Deputy Sheriff, Territory of Hawaii.

Honolulu, Oahu, Jan. 29, 1902. 6079-5t

SEALED TENDERS.

TENDERS WILL BE RECEIVED by the Clerk of the Judiciary Department up to 12 o'clock noon, Monday, Feb. 17, 1902, for printing and binding volume 14 of Hawaiian Reports, and publishing the decisions of the Supreme Court of the Territory of Hawaii, in accordance with the statement of particulars now on file in the office of said clerk.

Honolulu, February 10, 1902. 6089